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Boston Globe union loses dispute over arbitration

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The power of unions at *The Boston Globe* has taken another hit.

Last month, the newspaper's owners cornered its largest union, the Boston Newspaper Guild, into agreeing to \$10 million in concessions to save the paper. Now, management has won another key victory in court, this time with the machinists union.

The *Globe* convinced a federal judge to vacate an arbitrator's decision in an ongoing contract dispute with the International Association of Machinists — a tough feat, according to several employment attorneys. Arbitration decisions, they said, are rarely overturned.

At issue in the *Globe* case was whether the arbitrator — who had been called upon to help set the terms of a new contract because the two sides were at an impasse — could mandate that the new contract have an interest arbitration clause. Such a clause would basically allow an arbitrator to set the terms of the next contract should a future impasse be reached.

The *Globe* objected to using an arbitrator to determine future contract terms, arguing that arbitration is not mandatory under federal labor law. The arbitrator countered that the *Globe* had objected too late and inserted an interest arbitration clause in the new contract.

U.S. District Judge Douglas Woodlock of Massachusetts disagreed with that decision.

On Aug. 5, the judge vacated the arbitrator's decision, stating: "Given that federal labor law prohibits any party from insisting on interest arbitration to the point of impasse, it would be incongruous to allow an interest arbitration provision to be imposed against either party's will through an arbitrator's decision." The judge

cited several court decisions that warned against letting arbitrators use an interest arbitration clause "as a means of self-perpetuation."

James Redeker, a partner at Philadelphia's Duane Morris who has represented employers in union matters for nearly 40 years, called the decision "very significant because it refuses the invitation of the union and arbitrator to confuse well-established law." He said that "second-generation" interest arbitration clauses "invite mischief."

According to Redeker, it's generally established that either party can withdraw non-mandatory provisions from the bargaining table at will. He said arbitrators may not keep a non-mandatory item in a renewed agreement over the objection of one party, regardless of when the party objected.

Redeker said these rules are particularly important when the perpetuation of interest arbitration is involved. "Any other result would permit arbitral self-dealing of the worst kind," he said. "Neither party should be caught in that never-ending loop, and it would be contrary to public policy to permit it."

Management-side attorney David Strock of the Portland, Maine, office of Atlanta's Fisher & Phillips said the judge's decision follows "a relatively well-worn path" — although he allowed, "Since it is rare for a court to vacate an arbitration decision, the decision is noteworthy."

Wayne Perkins of Boston's Perkins & Perkins, who represented the machinists union, declined comment. Boston solo practitioner James Hall, another attorney for the union, would only say that he disagreed with the court's finding and that an appeal is under consideration.

Mark Batten of New York's Proskauer Rose, who represented the *Globe*, also declined comment.

According to court documents, *The Boston Globe* and its machinists union had an interest arbitration clause in their contract, which meant that if they couldn't agree on terms for a new contract when the old one expired, the union wouldn't strike, the *Globe* wouldn't lock out the employees, and an arbitrator would be brought in. About halfway through the current arbitration, the *Globe* decided it didn't want interest arbitration to be in the new contract.

According to court documents, the arbitrator re-imposed the clause because the *Globe* objected too late: It should have objected in collective bargaining before the arbitration began or at least at the outset of the arbitration. The *Globe* disagreed, as did the judge.

Andrey Tomkiw of Royal Oak, Mich.'s Tomkiw Dalton, who represents management in labor matters, said the *Globe* case offers an important lesson.

"You have to be very prepared in submitting your disputes at arbitration and specifying exactly which issues you want the arbitrator to decide. You make it too open-ended, and the arbitrator can go places that the party did not intend," he said.

Private employers tend to shy away from using interest arbitration, Tomkiw noted. "Employers typically don't like a third party making decisions on their behalf," he said.

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